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IN THE

Supreme Court of the United States

October Term, 1966

No. 172

PAUL B. JOHNSON, GOVERNOR, *et al*
Petitioners

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLERED PEOPLE, ROY WILKINS, CHARLES EVERS, WILLIE B. LUDDIN, REV. RALPH EDWIN KING, DORIS ERSKINE and DORIS ALLISON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented

Whether exclusion of the corporate respondent from the State of Mississippi through refusal of domestication because of its activities to achieve equal rights for Negroes contravenes the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Counter-Statement of the Case

This action, commenced in the U. S. District Court for the Southern District of Mississippi on June 7, 1963 by individuals, by members of the NAACP and by that corporation sought both temporary and permanent injunctive relief against officials of the City of Jackson, of the County

of Hinds, and of the State of Mississippi who had *inter alia* failed to act upon the corporate respondent's request for registration required by state law, and, through policies of arrest and harassment, had suppressed rights guaranteed by the First Amendment (R. 2-45). The District Court which denied all relief was reversed by the court below and directed to enter injunctions against city, county and state officials prohibiting interference with certain forms of protected expression and specifically, a mandatory injunction against the Governor, Attorney General and Secretary of State, their successors in office, their agents, servants and employees requiring approval the application for domestication of the NAACP and "to take all necessary and proper steps to entitle it to do business in the State of Mississippi" (P-A 42).[1] The petition for writ of certiorari is from this latter part of the judgment of the court below.

The NAACP is a non-profit non-share member corporation chartered under the laws of the State of New York and organized to end discrimination affecting Negroes by all lawful means (R. 394). It has local affiliates, called branches, in over 1000 communities in 49 states.[2] It is an association of individuals who acquire dual membership in both the national and the local affiliate by subscribing to the principles of the organization and by paying a membership fee (R. 396).

Individuals organized into branches of the corporate respondent, National Association for the Advancement of Colored People (NAACP) have been active in the State of Mississippi for many years prior to 1963 (R. 476, 340), and a Field Secretary's office has been maintained in Jackson at least since 1954 (R. 471; 474).

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[1] The Appendix to the Petition for a Writ of Certiorari will appear as (P-A).

[2] Final disposition of NAACP v. Alabama, 377 U. S. 288 (1964) has resulted in branches in 50 states.

In Mississippi, NAACP works to achieve equal rights of Negroes, by litigation of unjust laws, encouraging registration and voting, desegregating public facilities including schools and ending police brutality (R. 420-421). In this effort, NAACP has worked with other groups who share its views (R. 436, 493, 506-507), has participated with them in selective buying campaigns (R. 445), and in picketing and other public protest activities (R. 421).

Prior to 1963, Mississippi had no requirement for registration or domestication of foreign non-profit corporations. Pursuant to a 1962 notice from the Secretary of State that the laws had been changed by amendment of Section 5319, Mississippi Code of 1942, Recp., and that effective January 1, 1963, such corporations would be required to "domesticate" by the filing of an application and a certified designation of a local agent for service of process, on November 27, 1962 the corporate respondent filed an application and a certified designation of a local agent for service of process, with appended acceptance by the agent, together with an authenticated copy of its articles of incorporation, requisite filing fees, and a request that the organization be domesticated (R. 80). These acts were pursuant to the sixth paragraph of the amended Section 5319 (which formerly applied only to profit-making corporations) and to Section 5339 of the Mississippi Code of 1942.

Prior to commencement of this action, petitioners had neither acted upon the corporate respondent's application nor advised it of any disposition (R. 315-316). Subsequent to the filing of this action, petitioners produced a letter from former Governor Barnett (in whose stead the present Governor has been substituted (R. 130)), dated June 17, 1963, and a letter from petitioner Ladner to the President of respondent corporation advising it of the Governor's refusal to approve its application for domestication (R. 83-84). During a hearing on June 24, 1963, on respondent's

request for temporary injunctive relief, petitioner Attorney General Patterson produced a letter to Governor Barnett dated January 29, 1963, setting forth the Attorney General's opinion that the application for domestication by appellant corporation "is not authorized to be approved by your office" (R. 327); he testified that his opinion was based upon his belief that domestication of respondent corporation would not be "in the best interest" of the State of Mississippi and upon respondent corporation's failure to comply with Section 5310.1 of the Mississippi Code of 1942 as a prerequisite to domestication. Finally, on July 11, 1963, the President of respondent corporation was formally advised that the Governor had declined to approve the application for domestication in the State of Mississippi.

In explanation of his determination that domestication would not be in the best interests of the State of Mississippi, the Attorney General testified:

> My observation and experience with the NAACP which now covers about fourteen years led me, convinced me, that it is not to the best interest that the NAACP be domesticated, authorized to do business within the State of Mississippi. I have found that the NAACP, like a good many organizations of that kind, do not stick to the stated purposes of their corporate charter but go far beyond what their stated objectives and purposes is [sic]. For instance, your charter says nothing about the method in which the NAACP will employ in attempting to attain their objectives, it say nothing about promoting riotous parades and disorders, inflammatory speeches, meetings and things of that kind that they do indulge in, none of which is referred to of course in the charter of incorporation. That's the reason I said it was not to the best interest of the State of Mississippi for this organization to have the stamp of approval of the State of Mississippi placed upon it (R. 340).

and that the NAACP promoted and "stirred up" litigation dealing with civil rights (R. 344).

Interpolation of Section 5310.1 into the requirements for domestication of a foreign non-profit corporation resulted from the testimony of the Attorney General followed by that of the Assistant Attorney General:

> Q. . . . the question is did you determine that it violated any provision any specific provision of the Constitution or laws of the State? A. Except to one extent, further extent dealing with non-profit non-share corporations Subsection 1 of Section 5310.1 which provides among other things that three members of all of whom shall be adult resident citizens of the State of Mississippi authorized by any of said organizations in its minutes to apply for the charter that deals with granting of charters to non-profit non-share corporations.
>
> Q. Do I understand that you made an investigation and determined that this application did not comply with that provision of the charter? A. It does not comply on its face. Your certified copy of your charter of incorporation shows it to be a New York non-profit corporation, the incorporators all being residents of the State of New York or some other state close to the reby [sic].
>
> Q. Do I understand you to be saying sir that this section of the statute to which you are referring applies to foreign corporations seeking domestication? In other words a foreign corporation seeking domestication? A. That has always been our position that a foreign corporation certainly must comply with our own laws to be entitled to domestication.
>
> Q. I want to be sure I understand that includes then a requirement that the foreign corporation seeking domestication must include three residents of the State of Mississippi in its uh board of directors? A. That's right.[3]
>
> * * *
>
> A. As he explained to you Mississippi statute 5310.1 requires that all domestic non-profit corporations consist of members who are residents of Mississippi and of course that is the would apply to foreign cor-

[3] Testimony of the Assistant Attorney General.

> porations that applied for domestication because under the theory we think it's sound that you can't do indirectly what you cannot do directly and in order for a corporation to take on a non-profit or an association to take on a non-profit structure and thereby would be entitled to tax and other advantages offered by the State of Mississippi the legislature deemed it proper that they should be resident (R. 348).[4]

In their answer to the complaint which was filed June 27, 1963, petitioners admit that one of the duties of petitioner Patterson "is prosecuting foreign corporations unlawfully doing business in the State of Mississippi . . ." (R. 80), that the corporate respondent filed an application for domestication which has been denied, that petitioners have refused to approve that application for domestication, and that the corporate respondent ". . . is a foreign non-profit corporation operating and doing business in the State of Mississippi contrary to the provisions of State law" (R. 80-81).

The District Court dismissed the complaint, denied all relief, and found that respondents had not been shown to the court's satisfaction that denial of domestication was unlawful and that the suit violated the Eleventh Amendment. The court below reversed on the ground that interpolation of Section 5310.1, which relates applicants for original charters, was patently untenable and that the basis for exclusion of NAACP from the State violated the Fourteenth Amendment.

Reasons for Denial of Writ

1. The decision of the court below is in accord with prior decisions of this Court, *NAACP* v. *Alabama,* 377 U. S. 288 (1964), *NAACP* v. *Button,* 371 U. S. 415 (1963), *NAACP* v. *Alabama,* 357 U. S. 449 (1958), *Terral* v. *Burke Construc-*

[4] Testimony of the Attorney General.

tion Co., 257 U. S. 527 (1922), *Harrison* v. *St. Louis, San Francisco Railroad Company*, 232 U. S. 318 (1914), and is consistent with the accepted and usual course of judicial proceedings thereby obviating the need for review by this Court. *Ex parte Young*, 209 U. S. 123 (1908); *Griffin* v. *Sch. Bd. of Prince Edward Co.*, 377 U. S. 218, 228 (1964).

The grounds asserted for ousting the corporate respondent from the State of Mississippi, as stated by the Attorney General, bring this case within the *ratio decidendi* of *NAACP* v. *Alabama*, 377 U. S. 288 (1964) which declares as unconstitutional the "denial of the right to associate for the advocacy of ideas by lawful means." Under no circumstances can a governmental purpose to inhibit and suppress assembly, expression and advocacy of unpopular ideas be considered as a legitmate and valid exercise of state police power sufficient to deny to the corporate respondent the right to engage in civil rights activities within the State.

Moreover,

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (*Shelton* v. *Tucker*, 364 U. S. 479 at p. 488).

The reason for the denial of the domestication of the corporate respondent is clear (R. 340). Having determined that the activities of the NAACP and its branches were inimical to the retention of segregation and discrimination in Mississippi, petitioners sought to exclude it from the state and by termination of its operations, silence the voice of its members and inhibit concerted and organized political expression and group activity. Association of individuals within the framework of the NAACP affords a form of political expression protected by the Fourteenth Amendment and necessary to effectuate the meaning and purpose of the First Amendment's right to association.

NAACP v. *Button, supra.* The social, legal and economic benefits which accrue to members of respondent corporation, by virtue of their membership, reinforce their effectiveness and the effectiveness of their activities purposed to achieve the aims of the NAACP, *i.e.*, the eradication of racial segregation and discrimination by all lawful means. As this Court stated in *NAACP* v. *Alabama,* 357 U. S. 449 at page 459 (1958):

> . . . it [the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their views.

And at page 460:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

What this Court has sought to eliminate by its decisions enunciating the inviolability of freedom of association is potential and actual unconstitutional intimidation of the free exercise of the right to advocate, to litigate and to join together to strengthen expression. Accordingly, governmental action, by any means, which would restrict these rights must bear a relevant correlation to the governmental function sought to be served. Denial of domestication to and, therefore, exclusion of the corporate respondent from the State of Mississippi through the acts of its officials infringes upon Fourteenth Amendment guarantees. This is particularly so in this case where neither of the two reasons provided by the office of the Attorney General for its opinion, which was transmitted to the Gov-

ernor, that the corporate respondent's application was "not authorized to be approved by your [the Governor's] office" (R. 327) survive the test of constitutionality. The first, that domestication of the NAACP was not "in the best interest of Mississippi" because the organization encouraged and conducted activities to achieve civil rights for Negroes, to protest denial of these rights and promoted and "stirred up litigation" to achieve these rights (R. 340, 340) is unacceptable under settled principles of law. *NAACP* v. *Button, supra; NAACP* v. *Alabama,* 357 U. S. 449 (1958); 377 U. S. 288 (1964).

Litigation to achieve the aims of the NAACP, the lawful objectives of equality of treatment for Negroes was recognized as a constitutionally protected form of political expression in *NAACP* v. *Button, supra.* The denial of domestication, in the light of the provision of Section 5319 proscribing litigation in the state courts to any "such corporation so doing business without such domestication" [P-A 48] is a further violation of the due process clause of the Fourteenth Amendment. This prohibition, coupled with the threat of injunction against any corporation or group of persons carrying on business or performing any function in the name of the corporation "that has not qualified to do business in" the state "in the manner provided by law" (P–A 48) is that same "threat of sanctions" held to unconstitutionally deter the exercise of First Amendment freedoms in *NAACP* v. *Button, supra.* See also *Dombrowski* v. *Pfister,* 380 U. S. 479, 486-487 (1965).

In *NAACP* v. *Alabama,* 377 U. S. 288 (1964) this Court recognized that although the compelled disclosure of the names of members of the corporate respondent would effect the likelihood of a substantial restraint upon the exercises of the NAACP's members' rights to freedom of association, the complete suppression of the Association's activities in a state is an even more serious abridgement of that

right. That the State of Mississippi has sought to accomplish this end through a variation of the means employed in Alabama does not distinguish the purpose or effect of its actions. As in *NAACP* v. *Alabama, supra*, this case "in truth, involves not the privilege of a corporation to do business in a state, but rather the freedom of individuals to associate for the collective advocacy of ideas. (377 U. S. at p. 307.) Invasion of the right to freedom of expression cannot be successfully obscured by the recitation of irrelevant principles of corporate law which represent the proscribed subtle governmental interference with First Amendment freedoms recognized in *Bates* v. *Little Rock*, 360 U. S. 516 (1960).

2. The unlawfulness of the ouster of the corporate respondent attempted by petitioners is demonstrated by the facts. Admittedly, units of the NAACP have been active in Mississippi for a considerable number of years (R. 341, 474); and a paid State Field Secretary of the corporate respondent has maintained an office in Jackson since 1954. The NAACP is, in fact, in Mississippi. Prior to the 1962 amendments to the corporation laws of the State, there was no requirement for registration or domestication of foreign non-profit, non-share corporations. Section 5319 of the Mississippi Code of 1942, Recp. which requires a resident agent, originally applied to profit-making commercial stock corporations. In 1962, that section was amended to apply to "Nonprofit, Nonshare or Nonprofit or Nonshare Corporations." In addition to requiring of such corporations "organized or domesticated under the laws of the State of Mississippi . . .", designation of an agent for service of process or written power of attorney designating the Secretary of State as agent, upon penalty of restriction from the courts and a fine, there was added those sections which precipitate the question before this Court. The final two paragraphs of Section 5319 provide that no foreign non-profit or non-share corporation ". . . *shall do business in the State* . . . until it has first

been domesticated according to the laws of the State of Mississippi . . ." and further, restricts such corporation from bringing or maintaining any action in the state courts. The final paragraph of this section provides:

> Any such corporation or any person or group of persons found carrying on any of such corporations businesses or functions by soliciting funds, holding meetings, maintaining offices, circulating literature, or performing any other business or function in the name of such corporation that has not qualified to do business in this state in the manner provided by law may be enjoined by suit in the Chancery Court of the First Judicial District of Hinds County brought by the Attorney General in the name of the State of Mississippi.

That Mississippi recognizes the difference between commercial and non-profit corporations is implicit in its laws which provide for the organization of domestic non-profit and business corporations in distinct sections of the Code. (Compare Miss. Business Corp. Act P.B. #1712, regular session 1962, Section 2-105, with Section 5310.1, Miss. Code of 1942, Recp.) Whereas the Mississippi Business Corporations Act of 1962 makes specific provisions for admission of foreign business corporations (Sections 106-112), no similar provision is provided for nonshare, nonprofit corporations. It is significant that pursuant to Section 105 of the Business Corporation Law, the transaction of business requires a certificate of authority (which is specifically denied to foreign non-profit non-share corporations) procurable from the Secretary of State upon compliance with minimal and reasonable regulations and payment of a fee. (See Section 110.) Additionally, Section 105 specifically provides that while foreign business corporations for profit shall not have the right to transact business in the state prior to procuring a certificate of authority, the maintenance and defense of actions, maintenance of offices for transfer and exchange of securities, maintenance of bank accounts, solicitation of orders requiring acceptance out

of state, transacting business in interstate commerce, conduct of isolated transactions and investing in or acquiring mineral interests in transactions outside of Mississippi are not the "transaction of business."

Section 150 amends existing law to require, by virtue of Section 5319, domestication as a prerequisite to use of state courts and to carrying on of any business in the name of a corporation "that has not qualified to do business . . . in the manner provided by law"; these functions being subject to termination by an injunction action by the Attorney General. Whereas Alabama in *NAACP* v. *Alabama, supra,* applied existing law and acquired an ex parte injunction to silence the unpopular voice of the corporate respondent and its members for seven years, little perspicacity is necessary to see the preparation for similar frustration of freedom of association by the legislature and officers of the State of Mississippi. The only method for lawful operation of a foreign non-profit, non-share or non-profit or non-share corporation in the State of Mississippi is available through domestications as set forth in Sections 5339-5341 of the Mississippi Code.

3. The denial of domestication under the circumstances of this case infringes upon the corporate respondent's right to equal protection of the laws. It is significant that those foreign commercial corporations normally sought to be controlled by conditions of admission into a State are afforded unfettered opportunity to conform and comply. Conversely, the corporate respondent, a vehicle for political expression considered obnoxious because of its civil rights aims and activities is sought to be silenced and excluded from operation, by reason of the peculiar amendment of Mississippi statutes.

The reasons for denial of domestication offered by petitioners, together with the amendments to Section 5319, are more than suspect under the equal protection and commerce clauses. There is no residence requirement for

commercial foreign corporations under the Business Corporations Law, and these amendments are tailored to exclude the NAACP.

Petitioners' contention that a state's power to exclude a foreign corporation is here absolute is similarly unfounded in relation to the equal protection clause. The fact that no non-profit corporation had met the approval of the Attorney General's office since 1958 (R. 360) is irrelevant and of no probative value since the restrictive provisions requiring domestication of such corporations as a condition of doing business, holding meetings and participating in litigation in the State courts were not imposed until Section 5319 was amended in 1962 to become effective January 1, 1963.

2. In the light of the foregoing proscriptions against state suppression of freedom of association, nothing substantial remains of the principles of exclusion of foreign corporations sought to be raised by petitioners.

The power of a state to exclude a foreign corporation is not absolute, but is limited by the constitutional rights to due process and equal protection of the laws encompassed in the Fourteenth Amendment and by the Commerce Clause. *Southern Railway* v. *Greene*, 216 U. S. 400 (1910); *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891). The theory of the power of exclusion originated in the colonial era and related to expansive trading companies, the distinguishing feature of which was monopoly rather than legal personality. *Bank of United States* v. *Deveaux*, 9 U. S. (9 Cranch.) 61 (1809), recognized the right of a corporation to sue in states other than that of its charter and thereby destroyed preexisting restrictive principles. A corporation is a person within the Fourteenth Amendment, hence arbitrary exclusion or expulsion without any reasonable opportunity to qualify is without a rational purpose except that of exclusion itself and violates due process of law.

Gulf, C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 150 (1897), *Liggett* v. *Baldridge*, 278 U. S. 105 (1928), *Watson* v. *Employees Liability Corp.*, 348 U. S. 66, 80, 82 (1954). Just as a state may not exclude a foreign corporation where that exclusion is utilized to achieve a forbidden result, *i.e.*, the interference with interstate commerce or restriction of resort to federal courts, it may not exclude or expel to stifle protected forms of expression and association and thereby silence dissent. *Hanover Fire Ins. Co.* v. *Carr*, 272 U. S. 494 (1926); *Terral* v. *Burke Construction Co.*, *supra*; *NAACP* v. *Alabama*, 377 U. S. 288 (1964).

The second reason offered by petitioners as the basis for denial of domestication does not survive scrutiny. The application of the corporate respondent is charged as being inconsistent with Section 5310.1, a provision concerning initial incorporation of domestic non-profit, non-share corporations which requires that applicants for a charter be residents of Mississippi (R. 348) or that all members be Mississippi residents (R. 348). The interpolation of Section 5310.1 into provisions dealing with foreign corporations is refuted by the plain meaning of the corporation laws of Mississippi. This condition is but a fallacious subterfuge to disguise the suppression of freedom of expression and association. Requirements for incorporation in other states insure the impossibility of most, if not all foreign corporations from domesticating, were such a condition to have any validity. Both reasons are insufficient and run afoul of the Fourteenth Amendment.

As is vividly demonstrated, the provisions regarding domestication present no standards. They are susceptible of and indeed have been applied in such broad and sweeping terms as to render them unconstitutionally void and uncertain. In *Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924) this Court stated at page 513:

> . . . A state may not, under guise of protecting the public, arbitrarily interfere with private busi-

> ness or prohibit lawful occupation or impose unreasonable and unnecessary restrictions upon them. *Lawton* v. *Stelle,* 152 U. S. 133, 137; *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

See also *Hornsby* v. *Allen,* 326 F. 2 605 (5th Cir. 1964). While the doing of business in a state by a foreign corporation is admittedly a privilege, that privilege cannot be denied where, as in this case, that denial infringes upon constitutional rights of expression, association and advocacy before the courts. *NAACP* v. *Alabama,* 377 U. S. 288 (1964); *Louisiana* v. *NAACP,* 366 U. S. 293 (1961); *NAACP* v. *Button, supra.* Needless denial of that privilege is unconstitutional where the state discriminates in its rendition, *Yick Wo.* v. *Hopkins,* 118 U. S. 356 (1886), wields its power in such a manner as to deny due process or to discourage certain forms of voluntary association. *Shelton* v. *Tucker, supra.*

The corporate respondent represents a form of constitutionally protected political expression, and restrictions on its activities must be those of imperative need, whether a right or privilege be involved. Exclusion can be justified only by that compelling need reasonably related to the state's objectives, a factor lacking in this case. *NAACP* v. *Alabama,* 377 U. S. 288 (1964); *Dean Milk* v. *City of Madison,* 340 U. S. 349 (1951).

Petitioner's answer admits that the corporate respondent was "operating and doing business . . . contrary to . . . state law . . . " and was "unlawfully doing business" in the State (R. 80-81). Petitioners' contention that the corporate respondent is in no peril by its lack of domestication is refuted by their answer. Moreover, their lack of "militancy" or invocation of the injunction procedure provided, is secured by virtue of the jurisdiction of the federal courts having initially attached. It is well settled that the tribunal first-acquiring jurisdiction holds it to the exclusion of all others until final disposition of the cause. *Freeman* v. *Howe,* 65 U. S. (24 How.) 450 (1860); *Buck* v. *Colbath,* 70 U. S. 3 Wall. 334 (1865); *Taylor* v. *Taintor,* 83 U. S. 16

Wall. 366 (1872); *Ex Parte Crouch,* 112 U. S. 178 (1884); *Harkrader* v. *Wadley,* 172 U. S. 148, 164 (1898); *Peck* v. *Jenness,* 48 U. S. (7 How.) 612, 624-625 (1849).

4. The Eleventh Amendment furnishes no shield to injunctive relief, particularly where the right invaded and sought to be remedied is of a constitutional nature. This principle was settled in *Ex Parte Young, supra* and has been consistently reaffirmed ever since. *Griffin* v. *Sch. Bd. of Prince Edward Co., supra.* Cf. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E. D. La. 1960); aff'd 365 U. S. 569 (1961). Similarly, there is no jurisdictional impediment to compliance with the mandate of the court below. Jurisdiction is founded in 42 U. S. C. A. § 1983 and 28 U. S. C. A. § 1343(3), which relate to the due process and equal protection rights of persons as well as to the privileges and immunities of citizens. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); 377 U. S. 288 (1964); *NAACP* v. *Button, supra.*

CONCLUSION

Wherefore, for the reasons herein above set forth, respondents respectfully request that the petition in the above-entitled cause be denied.

Respectfully submitted;

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